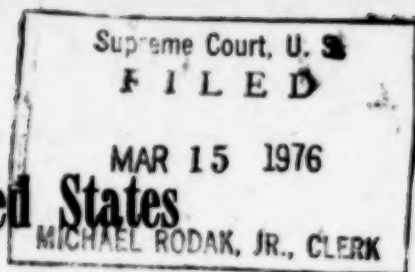


IN THE
Supreme Court of the United States



October Term, 1975
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
Petitioner,

vs.

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,
Respondents.

Brief of 33 States and Attorneys General as Amici Curiae in Support of Petitioner Joseph W. Jones

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**Brief of 33 States and Attorneys General as Amici
Curiae in Support of Petitioner Joseph W. Jones**

JURISDICTIONAL STATEMENT

This brief, amicus curiae, is respectfully submitted by the following 33 States, State Officers, and Attorneys General pursuant to Rules 42(1) and (4) of this Court: Avrum Gross, Attorney General of **Alaska**; Bruce E. Babbitt, Attorney General of **Arizona**; Jim Guy Tucker, Attorney General of **Arkansas**; Evelle J. Younger, Attorney General of **California** and L. T. Wallace, Director of the California Department of Food and Agriculture; Richard R. Wier, Jr., Attorney General of **Delaware**; Robert L. Shevin, Attorney General of **Florida** and Doyle Conner, Florida Commissioner of Agriculture; The State of **Georgia**; Wayne L. Kidwell, Attorney General of **Idaho** and Idaho Department of Agriculture;

William J. Scott, Attorney General of **Illinois**; Curt T. Schneider, Attorney General of **Kansas**; Robert F. Stephens, Attorney General of **Kentucky**; The State of **Louisiana**, Department of Justice, William J. Guste, Jr., Attorney General; The State of **Maine**, by Joseph E. Brennan, Attorney General; Francis B. Burch, Attorney General of **Maryland**; The Commonwealth of **Massachusetts**, Francis X. Bellotti, Attorney General; The State of **Mississippi**, by A. F. Summer, Attorney General; Robert L. Woodahl, Attorney General of **Montana**; Paul L. Douglas, Attorney General of **Nebraska**; Robert List, Attorney General of **Nevada**; Toney Anaya, Attorney General of **New Mexico**; Louis J. Lefkowitz, Attorney General of **New York**; William J. Brown, Attorney General of **Ohio** and John M. Stackhouse, Director, Ohio Department of Agriculture; The State of **Oklahoma**, ex rel. Larry Derryberry, Attorney General; The State of **Oregon**; The Commonwealth of **Pennsylvania**, Department of Agriculture, Raymond J. Kerstetter, Acting Secretary; Daniel R. McLeod, Attorney General of **South Carolina**; William J. Janklow, Attorney General of **South Dakota**; John L. Hill, Attorney General of **Texas**; Vernon B. Romney, Attorney General of **Utah**; The Commonwealth of **Virginia**, Virginia Department of Agriculture and Commerce, by Andrew P. Miller, Attorney General; **Washington** State Department of Agriculture by Slade Gorton, Attorney General; Chauncey H. Browning, Jr., Attorney General of **West Virginia**; V. Frank Mendicino, Attorney General of **Wyoming**. (Amici curiae are sometimes referred to *infra* as States.)

The States, organizations and law enforcement officers listed in footnote 1 have authorized amici to advise the Court that they support the granting of certiorari.¹

¹The following jurisdictions and organizations support the granting of certiorari in this case.

States:

Carl R. Ajello, Attorney General of Connecticut; and The State of Hawaii, John Farias, Jr. as Chairman of the Board of Agriculture, George Mattimoe, Deputy Director.

National Organizations:

American Farm Bureau Federation, National Association of Retail Grocers of the U.S., Inc. (NARGUS represents more than 120,000 retail stores which sell approximately one-half (or fifty billion dollars) of the value of retail sales of food and consumer commodities in the United States); National Conference on Weights and Measures; National Consumers Congress; National Grange (The American Farm Bureau Federation and the National Grange together have as members the majority of America's farmers); National Scale Men's Association; Scale Manufacturers Association, Inc.

Regional and State Organizations:

Associated Dairymen (California); Associated Milk Producers, Inc.; California Association of Weights and Measures Officials; California Cattlemen's Association; California Citizen Action Group; California Farm Bureau Federation; California State Grange; Consolidated Milk Producers for San Francisco; Consolidated Milk Producers of Tulare County (California); Consumers Cooperative of Berkeley, Inc.; Federated Dairymen (California); Greenbelt Consumer Services, Inc., Silver Springs, Maryland; Hanover (New Hampshire) Consumer Cooperative Society, Inc.; League of California Milk Producers; Mid-America Dairy-men, Inc. (Missouri); Milk Producers Council (California); Producers' Market Milk Association (California); Western Dairy-men's Association (California).

California Law Enforcement Officers:

D. Lowell Jensen, District Attorney, Alameda County; Thomas L. Kelly, District Attorney, Alpine County; Guy E. Reynolds, District Attorney, Amador County; Kenneth H. Leach, District Attorney, Butte County; Joseph W. Kiley, District Attorney, Calaveras County; Robert W. Weir, District Attorney, Del Norte; Terrence M. Finney, District Attorney, El Dorado County; Noble Sprunger, County Counsel, El Dorado County; William A. Smith, District Attorney, Fresno County; L. H. Gibbons, District Attorney, Inyo County; Ralph B. Jordan, County Counsel, Kern County; Albert M. Leddy, District Attorney, Kern County; Harold L. Abbott, District Attorney, Lassen County; John K. Van de Kamp, District Attorney, Los Angeles County;

(This footnote is continued on next page)

INTEREST OF AMICI CURIAE

The 33 States which join in this brief represent more than 140 million of our nation's 212 million citizens, every demographic and geographic region. We grow 70 percent of our nation's agricultural output and produce a similar percentage of our nation's other goods, and services. We both ship to other states and import from them mammoth quantities of goods. We are vitally concerned with assuring our consumers, and all of our nation's farmers, manufacturers and distributors, a truly free and honestly competitive marketplace as this promotes the well-being and prosperity of our citizens and business people. A keystone of

Bruce Bales, District Attorney, Marin County; Douglas J. Maloney, County Counsel, Marin County; Duncan M. James, District Attorney, Mendocino County; Russell M. Koch, County Counsel, Merced County; John P. Baker, District Attorney, Modoc County; James D. Boitano, District Attorney, Napa County; Ronald L. MacMiller, District Attorney, Nevada County; Cecil Hicks, District Attorney, Orange County; Gerald E. Flanagan, District Attorney, Plumas County; Byron C. Morton, District Attorney, Riverside County; John M. Price, District Attorney, Sacramento County; Edwin L. Miller, Jr., District Attorney, San Diego County; Joseph Freitas, District Attorney, City and County of San Francisco; Joseph H. Baker, District Attorney, San Joaquin County; Robert N. Tait, District Attorney, San Luis Obispo County; Keith C. Sorensen, District Attorney, San Mateo County; James M. Cramer, District Attorney, San Bernardino County; Stanley M. Roden, District Attorney, Santa Barbara County; Louis P. Bergna, District Attorney, Santa Clara County; Christopher C. Cottle, District Attorney, Santa Cruz County; Robert A. Rehberg, County Counsel, Shasta County; Robert W. Baker, District Attorney, Shasta County; Gene L. Tunney, District Attorney, Sonoma County; Donald N. Stahl, District Attorney, Stanislaus County; Edward F. Buckner, County Counsel, Sutter County; H. Ted Hansen, District Attorney, Sutter County; Henry J. Goff, Jr., District Attorney, Tehama County; Calvin E. Baldwin, County Counsel, Tulare County; J. W. Powell, District Attorney, Tulare County; Stephen Dietrich Jr., County Counsel, Tuolumne County; C. Stanley Trom, District Attorney, Ventura County; Bartley C. Williams, District Attorney, Yuba County.

our commercial system is an honest, accurate and effective weights and measures system. To achieve these ends our Legislatures have enacted, and we enforce, laws requiring that representations made on packaged food commodities must be true and not misleading—that there be no fraud in the marketplace.

Our actions in the weights and measures field are not of recent origin, nor has their importance been unrecognized by this Court. They began prior to ratification of our Federal Constitution and received explicit approval by this Court at least as early as 1897.

“Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. *Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures*, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . .” *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897). (Emphasis added.)

No modern society built upon free competition among private businesses can long survive without effective enforcement of weights and measures laws. Yet in the face of recognition by this Court of the historic and crucial role of the States in assuring consumers and competitors of honest weights and measures, the court below invalidated California laws designed to

implement this reserved power of the States, ignoring the Second Circuit's earlier affirmance of such State authority.

Of compelling concern to amici curiae is the adverse impact which the decision of the Ninth Circuit, if not reversed, could have upon the power of the States in forbidding false representations in the marketplace and in preventing the detrimental consequences thereof to both consumers and honest businesses. More broadly stated, the issue presented is whether the Ninth Circuit has improperly denied California and its sister States their inherent power to protect the welfare of their citizens and to assure them free and honestly competitive markets.

The vital issue presented to this Court for resolution is the power of the States to prevent fraud in the marketplace by requiring true statements of weight on commodities sold to consumers.

Amici curiae have substantial interests in the resolution of this matter.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS MISCONSTRUES PRINCIPLES OF LAW ENUNCIATED IN PRIOR DECISIONS OF THIS COURT; ITS DECISION DEPRIVES CALIFORNIA AND ITS SISTER STATES OF THEIR SOVEREIGN AUTHORITY TO PROTECT THE HEALTH AND WELFARE OF THEIR CITIZENS

A. The Ninth Circuit's Preemption Holding Conflicts With Principles Established in Prior Decisions of This Court

(1) The Ninth Circuit's Argument

The court below reached its conclusion that California's laws² are preempted by the federal Food, Drug and Cosmetic Act, 21 U.S.C. section 301 *et seq.* (FDCA) and by the federal Fair Packaging and Labeling Act, 15 U.S.C. section 1451 *et seq.* (FPLA) upon the following reasoning.

First, there is "no unmistakable Congressional mandate that the FDCA and FPLA exclude weights and measures regulations by the States which impose standards which differ from the federal standards. . . ."³

²1963 Calif. Stats., ch. 353, California Business and Professions Code section 12211, and 4 California Administrative Code, ch. 8, subch. 2, Article 5. The text of these laws is set out at pp. 69-90 of the Appendix to the Petition for Certiorari filed by Joseph W. Jones (hereinafter Pet. Appx., p.).

³The court expressly recognizes that weights and measures regulation (1) is "normally" within the exercise of the States' police powers, (2) is not a subject demanding exclusive federal regulation, and (3) the FDCA contains no express preemptive language and its legislative history "shows a regard in the Congress for the exercise of State police power" (quoting from the House Report on the first Food and Drug Act: "It is not proposed by the bill to interfere in any way with the power of the State officials over local trade. . . .") (Pet. Appx., p. 45.)

(Pet. Appx., p. 44.) (This unqualified statement by the court that there is no express preemption of State weights and measures laws is immediately contradicted.)

Second, section 12 of the FPLA⁴ expressly preempts State laws to the extent they are less stringent than the FPLA requirement, which, as stated in 15 U.S.C. section 1453, is that labels must “separately and accurately state the net quantity of contents. This preemption is not merely of *labeling* requirements (type size, placement, etc.) but extends to the *accuracy* of label statements as well. (Pet. Appx., pp. 45, 46.)

Third, the test to be applied is “whether California’s scheme impermissibly *conflicts* with federal law. This is an inquiry different from that where express preemption is involved.” [Citation omitted.] (Pet. Appx., p. 46.)

Fourth, the California laws set a standard both *different than* the FDCA reasonable-shortage-in-each-package requirement and *less stringent than* the FPLA accuracy-in-each-package requirement.

Therefore the California laws do “impermissibly conflict with the standards imposed by” the FDCA and FPLA.⁵ (Pet. Appx., p. 52.)

⁴15 U.S.C. section 1461. The text of this section is set out, *infra*, at p. 9.

The court reaches its conclusion that FPLA preempts state laws regulating label *accuracy* as well as *format* even though it takes pains to quote the legislative history of this section and characterizes this language as standing for *no* Congressional intent to restrict the authority of the States. (Pet. Appx., p. 46.) (See, *infra*, at pp. 9-10.)

⁵It is possible to conclude from Part III of the court’s opinion that the State laws in issue are preempted only by the FPLA and not by the FDCA. However, the court’s emphatic declaration in Part V of its opinion is that both federal laws are offended. If the latter is indeed the case, the circuit court’s

In the following sections amici demonstrate the manifold errors of the circuit court’s analysis—its misinterpretation of the federal laws, misapplication of the “impermissible conflict” test of preemption, and the serious, adverse consequences of the circuit court’s ruling.

(2) The Circuit Court Misconstrued the Federal Law

The court below twice erred in its construction of the FPLA.⁶

First, the court misinterprets section 12 of the FPLA, 15 U.S.C. section 1461, as preempting state laws regulating *accuracy* of label statements at time of sale as well as their *form*. (See Pet. Appx., p. 45.)

15 U.S.C. section 1461 provides:

“It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the *labeling* of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto.” (Emphasis added.)

holding is contrary to (1) *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427 (1918), which held that State laws were not preempted by the FDCA, and (2) a proper analysis of the FPLA. (See, *infra*, at pp. 9-10.)

⁶As the problems with circuit court’s interpretation of the FDCA arise from its misapplication of the preemption test and not from construction of the express terms of that law, discussion of the FDCA is deferred to subsection 4, *infra*, at pp. 17-18.

Thus this preemption provision is expressly limited to the *manner* of labeling of net quantity statements (*i.e.*, type size and placement), and does not purport to regulate the *accuracy* of that information. The *accuracy* of such labeling is covered in another section of this Act, 15 U.S.C. section 1453(a)(2), which contains no preemptive language. *Cf. Atlantic Ocean Products, Inc. v. Leth*, 292 F.Supp. 615 (USDC, D. Oregon, 1968), *aff'd*, 393 U.S. 127 (1968), in which the court held that section 1461 did not preclude the State of Oregon from regulating product names even though the descriptive name used was part of the package label.

The interpretation advanced by amici harmonizes the purposes of this federal act—to enhance both fair competition and consumer protection—with the power of the States to assure honest weights and measures. By contrast, the construction of section 1461 claimed by the court below, as preempting “less stringent” state laws which regulate accuracy of label information, needlessly frustrates the long recognized police power of the States and must therefore be rejected.⁷

Second, the court erroneously concludes that federal law does not permit use of a lot sampling procedure to determine accuracy of label weight statements even

⁷The Act's legislative history fully supports this limitation of preemption: “Section 12 [of the Bill, 15 U.S.C. § 1461] provides that regulations promulgated under the act shall supersede State law only to the extent that the States impose net quantity of contents *labeling* requirements which differ from requirements imposed under the terms of the act. The bill is *not intended to limit the authority of the States to establish* such packaging and labeling *standards* as they deem necessary

though the procedure is statistically valid and is based upon principles promulgated for the States' use by the National Bureau of Standards.

In such a procedure the accuracy of label weight statements of a group (lot) of homogeneous product bearing the same marked weight is determined by inspection of a portion (sample) of the packages which comprise the lot.

As promulgated by the National Bureau of Standards this procedure has three key elements: (1) individual packages are permitted reasonable variations (both plus and minus), (2) the lot is considered to meet the statutory standard so long as its average weight is at least the weight stated upon the packages, and (3) packagers are permitted to overpack to compensate for unavoidable variations in weight due to loss of moisture.

The California regulation (Article 5), which the trial court found to be statistically valid but use of which it and the Ninth Circuit nevertheless enjoined, possesses all of these elements.

The circuit court's holding is of substantial concern to amici as we (1) use either Article 5 or a similar lot averaging procedure in evaluating compliance with the statutory standard of true weight and (2) devote

in response to State and local needs.” (Emphasis added.) Senate Report No. 1186, 3 U.S. Congressional and Administrative News (1966) p. 4069 at 4077, and see the list of labeling problems sought to be remedied at p. 4071—each of which is concerned with *form* and *not accuracy* of weight at time of sale.

our limited resources to taking action against lots which are short weight, rather than over weight.

Each of the principles which we use and each of those principles which the court below found objectionable has its basis in the procedures developed at the National Bureau of Standards and published by the Secretary of Commerce pursuant to 15 U.S.C. section 272. (United States Department of Commerce, National Bureau of Standards, Handbook 67, Checking Pre-packaged Commodities, 1959.) (The text of Handbook 67 is set forth in the Appendix to this brief, commencing at p. 3.) The principles set out in this publication were adopted after thorough consultation with the packaging industry, have been in use for seventeen years and have been applied to billions of packages.

Handbook 67 specifically authorizes weight to be determined on an average basis, requires packers to overfill such commodities as are susceptible of moisture loss, and recommends legal action only when the *average* weight of the lot is *less than* the standard required.

Similar statistical procedures utilizing the accuracy-on-the-average procedure are used by federal agencies to determine compliance with statutory standards calling for absolute accuracy in each item. For example, the United States Department of Agriculture and Environmental Protection Administration (EPA) have interpreted a statute which requires that label statements of weight be accurate, subject to regulations which permit reasonable variations, and thus similar to those at issue, to require accurate-weight-on-the-average. 40 C.F.R. §162.104. (Appx., *infra*, at pp. 2-3.)

Both the EPA regulation and Handbook 67 require that commodities subject to moisture loss be packaged

so that the statement of net contents will be correct *when the product is purchased*. 40 C.F.R. section 162.104(e), Handbook 67, p. 8, § 8, Step 3. (Appx., *infra*, at pp. 3 and 15.) *It is anomalous indeed that USDA required and EPA now requires that purchasers of poisons get true weight, while the court below sanctions short weight in food products.*

The policies in favor of the procedures utilized by petitioner are persuasive. While it is clear that the standard which petitioner enforces is true weight to the consumer (the same standard as is required by the FPLA (15 U.S.C. 1453(a)(2), *accord* opinion below (Pet. Appx., p. 47)), it is equally obvious that not even all of the resources of all of this nation's weights and measures officials combined would be sufficient to inspect each package of every commodity produced which bears a weight representation. Rather, adherence to this truth in labeling standard depends upon the good faith packers—encouraged by enforcement. It is equally apparent that a procedure which enables a weights and measures official to determine with substantial accuracy the weight of thousands of packages by inspecting only a portion of those packages meets both the packer's right to fair treatment and the enforcement official's time and budgetary constraints. No right-thinking person would insist upon package by package inspection of a lot of 5,000 packages when modern statistics provides what the district court found be to be a valid procedure to determine the weight of those packages by weighing only a sample. Thus, when a federal or State statute calls for accuracy and when a large number of packages must be inspected

for compliance with that standard, it is logical and practical and fair to enforce that standard by use of a valid statistical procedure which utilizes an accuracy-on-the-average standard. The circuit court's rejection of this approach is, therefore, misconceived.

The court's other major objection to the procedure under discussion is similarly unfounded. The court finds objectionable that Jones takes enforcement action against only those lots of product which he validly determines to be short weight; the court would have him also order removed from sale over weight lots as well. (Pet. Appx., pp. 48, 49 and 51.) As an enforcement procedure this is hardly prudent or sensible. It does not help consumers and is expensive for packagers. And such a view is directly contrary to that of the National Bureau of Standards, the agency charged by Congress with developing appropriate weights and measures enforcement procedures. 15 U.S.C. 272. (Appx., *infra*, p. 15.)

Thus, the ruling by the court below that a valid statistical procedure may not be used as an enforcement tool is contrary to logic, policy, published federal regulations dependent upon construction of similar statutes, and to procedures promulgated by the federal agency charged with expertise in this field. The impact of the court's ruling is to frustrate not only weights and measures enforcement but use of all statistical sampling procedures for compliance with innumerable laws.⁸

⁸By virtue of 15 U.S.C., § 1460 the court held that compliance with the FDCA excused compliance with the stricter FPLA standard. This construction is also questionable in light

(3) The Court Below Misconstrued State Laws

The court below enjoined use of California Business and Professions Code section 12211 and its testing procedure (Article 5)⁹ because (1) California law evaluates compliance with a true weight standard by means of a lot averaging procedure, (2) petitioner orders off sale only those lots in which the actual weight is less than the label weight, and (3) California evaluates all variations on a statistical basis. (Pet. App., pp. 47-50.) For the reasons set forth in subsection 2, *supra*, the circuit court erred.

In addition to the erroneous conclusions that federal law precludes use of a lot averaging procedure and that federal law demands removal from sale of over weight packages, the court below is equally wrong in condemning California's treatment of variations. The court objects to consideration of variations solely on a statistical basis. (Pet. Appx., p. 48.) Yet no statistical sampling procedure and no weighing device can determine the *cause* of a discrepancy from label weight.

of 15 U.S.C. section 1456. This section makes subject to the misbranding provisions of the FDCA, 21 U.S.C. §§ 331-337, any consumer commodity which is a food, drug, device or cosmetic. An at least equally plausible construction of § 1460 is that the more stringent standards of FPLA are to be applied to commodities subject to regulation by both FPLA and FDCA.

⁹California Business and Professions Code section 12211 requires that each "sealer" (weights and measures official) weigh packages "in order to determine whether [they] contain the quantity or amount represented . . ." and permits the California Director of Food and Agriculture to adopt regulations for the accomplishment of this objective "provided, that the average weight or measure of the packages . . . in a lot . . . sampled shall not be less . . . than the net weight or measure stated upon the package. . . ." The Director

(This footnote is continued on next page)

The circuit court would have the inspector who finds a package short weight determine the cause—underfill, loss of moisture, other causes—and then determine what part of the shortage is due to what cause, and finally decide whether the shortage is “reasonable” for that product in that packaging material. This is impossible. The inspector can know the amount of shortage but cannot know why or whether the shortage is “reasonable.” *To require the impossible is to end effective weights and measures enforcement.*

The court’s criticism of Article 5 is in fact a condemnation of all statistical sampling plans. For the reasons set forth above, this conclusion is a major step backward, in derogation of logic and practicality and in conflict with the well-reasoned, contrary conclusion of the National Bureau of Standards, the federal agency with recognized expertise in this field.¹⁰

adopted such a uniform testing procedure (Article 5) which the district court held to be statistically valid. 357 F.Supp. 529 at 533; Pet. Appx., p. 57.

¹⁰Amici take exception to much of the reasoning utilized by the court below. Among the other errors in the circuit court’s opinion is its analysis of California Business and Professions Code §§ 12607 and 12614. (Pet. Appx., pp. 47-48 and 49-50.) At this point in its opinion the court attempts to show that the standard established by § 12607 is less stringent than the federal standard for the reason that § 12614 expressly recognizes causes for variations in addition to those permitted by the federal regulation. There is at least one flaw in the court’s analysis: § 12614 was repealed four years before the complaint in this action was filed. 1969 Calif. Stats. ch. 1309, p. 2643 § 2.

While the court concludes that § 12613 prevails over § 12614 (Pet. Appx., p. 49) and thus its failure to observe the repeal of the other statute is not crucial to the court’s holding, the erroneous conclusion is indicative of the circuit court’s errors of analysis and its disfavor of State activity in a field of historic State concern.

(4) The Ninth Circuit Misapplied the Preemption Tests Enunciated by This Court

As set forth in subsection (1), *supra*, the circuit court finds that the FPLA and FDCA do not expressly preempt State laws and that the inquiry to be made is whether California law impermissibly conflicts with federal law. (See Pet. Appx., p. 46.)

However, in the discussion which follows this statement the court below uses an express preemption analysis, concluding that the questioned State statutes are both different than the FDCA and less stringent than the FPLA. Amici have set forth, *supra*, the reasons why these conclusions must be rejected. What is crucial at this point is, rather, that the court below does *not* apply the implied preemption test, which it stated is necessary.

As this Court has repeatedly stated, preemption is to be implied only where there is a direct and positive conflict between the state and federal objective—where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and “only where the repugnance or conflict is so ‘direct and positive’ that the two acts cannot be reconciled or consistently stand together.” *Kelly v. Washington*, 30 U.S. 1, 10 (1937).

Assuming, *arguendo*, there be a conflict between California and federal laws, it does not approach the direct and positive clash which is a necessary predicate to a holding of preemption. As interpreted by the circuit court, both federal and California laws seek to insure accuracy in package weight representations. Even if we accept the circuit court’s criticisms

of the California laws, their differences from their federal counterparts do not stand as an obstacle to achievement of the Congressional purpose. Whatever differences there may be, compliance with both state and federal law is not impossible or even difficult. Indeed the circuit court's principal criticisms relate to California's use of a statistically sound testing procedure which is in principle identical to a similar procedure promulgated by the National Bureau of Standards.

Once this fundamental error in the Ninth Circuit's analysis is pointed out, all possibilities of finding the requisite irreconcilable conflict in purpose and effect disappear. The court below simply errs when it claims there is implied preemption merely because the State law is not in all respects identical to the federal, even if it is assumed, *arguendo*, that its interpretation of federal law is correct.

The court's error is particularly egregious as petitioner's activity is in a field which is historically one of local concern and one which is recognized by this Court as a competent exercise of its police power. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1962); *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897).

Thus, amici contend that the circuit court improperly weighed the factors involved and reached a conclusion in direct conflict with principles enunciated in prior rulings of this Court.

B. The Decision Below Deprives California of Its Sovereign Police Power

The discussion in the previous section assumed, for the sake of argument, that Congress has a right to legislate in the area of consumer protection. As will be demonstrated, *infra*, however, this assumption is by no means unqualified.

While it is manifest that the purpose of the FDCA and the FPLA is to inform and protect consumers from misbranded products (*e.g.*, *United States v. Kocmond*, 200 F.2d 370 (7th Cir. 1952); *United States v. Sullivan*, 332 U.S. 689, 696 (1947)), these laws clearly operate in a field which is traditionally and necessarily one of local concern and subject to independent state regulation (*e.g.*, *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427, 431-33 (1918)).

The police power of the States necessarily includes the power to prevent deception of consumers. As this Court said almost 20 years ago:

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1897).

And as more recently stated in *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 144 (1962):

“[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. . . . [T]he States have always possessed a legitimate interest in ‘the protection of . . . [their] people against fraud and deception in the sale of food products at retail markets within their borders.’” [Citations omitted.]

No section or clause of our federal Constitution relinquishes this police power of the States. And the Tenth Amendment specifically reserves to the States all powers not delegated to the United States by the Constitution, nor prohibited by it to the States.

Indeed, in light of the legislative history of the FPLA,¹¹ it should be clear that Congress did not intend the restriction upon the power of the States which is imposed by the court below.

Even had Congress intended to restrict the power of the States in this field it could not have constitutionally done so.

Nowhere in our Constitution is the police power of the States expressly or impliedly relinquished; and in light of *Patapsco Guano, supra*, and *Florida Lime and Avocado Growers, supra*, amici urge that this Court has specifically affirmed the police power of the States in this field, *especially when the challenged*

¹¹“ . . . The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs.” (Senate Report No. 1186, 3 U.S. Code, Congressional and Administrative News, p. 4069 at p. 4077 (1966).)

State laws impose standards more stringent than those of federal law. (See Pet. Appx., p. 48.)

To all of the States, the consequences of the Ninth Circuit’s ruling are devastating; if this ruling is permitted to stand the States will be unable to prevent the sale of foodstuffs which are falsely labeled.

The conflict of the ruling below with the sovereign authority of the States to prevent fraud in the marketplace justifies the grant of certiorari.

2. THE NINTH CIRCUIT’S REINSTATEMENT OF THE VAGUE FEDERAL REGULATION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In Part II of its opinion (Pet. Appx., pp. 42-44) the circuit court holds that the trial court erred when it found 21 C.F.R. 1.8(b)(q) was invalid for the reason that “Section 1.8b(q) suffers from the same infirmity as did 9 C.F.R. 317.2(h)(2) in the *Rath* . . . case. [*Rath v. Becker*, F.2d (9th Cir. October 29, 1975) petition for cert. filed *sub nom. Wallace, et al. v. The Rath Packing Company*, 44 USLW 3440 (No. 75-1052)]. The Secretary has failed to express tolerances which may be the ‘reasonable variations’ of the regulation. Without such an expression from the Secretary each enforcement officer is left to his own personal standard of what is reasonable.” *General Mills v. Jones*, USDC C.D. Cal. 1973, reported at F.2d (Pet. Appx., p. 54.)

As did the court below, amici must necessarily refer to Part II of that court’s opinion in *Rath* (Pet. Appx., pp. 18-26) which contains the court’s analysis of 9 C.F.R. 317.2(h)(2), promulgated by the Secretary of Agriculture as a purported guide to enforcement of

the Wholesome Meat Act, 21 U.S.C. section 601, *et seq.*

21 C.F.R. 1.8(b)(q) provides:

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

The vagueness of the instant regulation as interpreted by the circuit court is manifest. The court below interprets this regulation as permitting "reasonable variations," *i.e.*, that each package may be short weight by an unstated amount. Yet nowhere in the regulation is there definition of the phrases (1) "good distribution practices," (2) "unavoidable deviations," (3) "good manufacturing practices," or (4) "reasonable variations."

The invalidity of this regulation is demonstrated by consideration of the decisions of this Court in the field of economic regulation. In *United States v. Cohen Grocery Co.*, 225 U.S. 81 (1920), this Court found to be void for vagueness a statute which made it "unlawful for any person willfully . . . to make an *unjust* or *unreasonable* rate or charge in handling or dealing in or with any necessities." (Emphasis added.) *Id.* at 86.

And in *United States v. National Dairy Corp.*, 372 U.S. 29 (1962), in upholding section 3 of the Robinson Patman Act, 15 U.S.C. section 139, which makes

it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor," this Court distinguished *Cohen* from *National Dairy* as "the standard held to be too vague in *Cohen* was without a meaningful referent in business practice of usage" while the statute at issue in *National Dairy* addressed a specific business practice. *Id.* at 36.

The teaching of *Cohen* and *National Dairy* is that the vagueness of a particular law turns upon the determination of whether the rule or prohibition sought to be established has a *meaningful referent*.

In the instant case the District Court correctly determined that there was no such standard or frame of reference.¹² The trial court specifically found that (1) the regulation on its face failed to set an ascertainable standard and (2) there was no uniform standard for use by enforcement officers. (357 F.Supp. at 534, Pet. Appx., p. 65.) Yet the circuit court wholly ignored these findings by the trial judge and reinstated the regulation without giving it any meaningful referent.

In order to so hold, the circuit court had to ignore (1) prior rulings of this Court, cited above, which compel the conclusion that the regulation as reinstated is void for vagueness, (2) a clear opportunity to construe the regulation in question in the manner (a) authorized by the National Bureau of Standards, (b) adopted by USDA and EPA, (c) in fact utilized by

¹²In so holding the court mistakenly rejected the analysis presented, *supra*, at pp. 13-14 by amici. Had it accepted this construction there would be the requisite meaningful referent.

virtually all of the States and (3) the published concession by the Food and Drug Administration that its regulation was not sufficiently definite.

Indeed, the Food and Drug Administration (FDA) has itself expressly acknowledged that its reasonable variations regulation is indefinite. Thus, in adopting a set of regulations including the one in question at 32 FR 10729, July 21, 1967, FDA specifically acknowledged its responsibility to promulgate *specific standards* for determining whether any variation is reasonable or unreasonable. To this end the FDA Commissioner stated:

"7. Proposed § 1.8(b)(q) is revised and calls for the net quantity statement to express an accurate statement of the quantity of contents of the package."

Then, after stating the terms of the regulation, the Commissioner continued:

"At a later date the Commissioner will propose an amendment to section 1.8(b)(q) to specify a means whereby industry and State and Federal Government may make a *definitive determination whether any variation is reasonable or unreasonable*." 32 FR at 10730, July 21, 1967. (Emphasis added.)

Thus, while FDA, the agency charged with interpretation of the regulation in issue, has acknowledged that it had not sufficiently defined the enforcement standard, the court below sustains that very regulation.

Thus the court below both ignores a construction of the regulation which would have a meaningful refer-

ent and ignores decisions of this Court which, under the circuit court's interpretation of the questioned regulation, compel the conclusion that the regulation is void for vagueness.

The Ninth Circuit's error in reinstating the questioned regulation justifies review of that decision by this Court.¹³

3. THE DECISION BELOW IS CONTRARY TO PRINCIPLES AFFIRMED BY THE SECOND CIRCUIT IN GENERAL MILLS, INC. V. FURNESS

In *General Mills, Inc., et al. v. Furness*, 398 F. Supp. 151 (S.D. N.Y. 1974), *affd.* 508 F.2d 536, the court rejected plaintiffs' contention of preemption of a New York City ordinance regulating the weight

¹³In validating the regulation the court below relied in large part upon this court's decision in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932). However, as the District Court points out, 357 F.Supp. at 534, *Shreveport* does not reach the question presented in the instant case: the re-delegation to each USDA compliance officer of deciding whether in "his judgment" a variation (caused by an unknown) is or is not "reasonable."

The court below also relies heavily upon validation by Congressional inaction: "Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's [Agriculture] interpretation of the scope of his powers." (Pet. Appx., p. 26.)

First, the logic of this assertion is questionable—even long-standing acquiescence in unconstitutional activity cannot correct constitutional infirmities.

Second, Congressional inaction may, equally, stand for approval of the States' activity in this field.

Third, the absence of Congressional action on any question is hardly evidence of more than the inherent complexity and slowness of the legislative process. See *National Petroleum Refiners Assn. v. F.T.C.*, (D.C. Cir. 1973), 482 F.2d 672 at 695-97, *cert. denied* 415 U.S. 951 (1973), citing *Power Reactor Development Co. v. Int. Union of Elec. Radio & Machine Wkrs.*, 367 U.S. 396 at 409 (1961) (imputing Congress-

(This footnote is continued on next page)

of prepackaged commodities and in so doing (1) upheld use of Handbook 67 as a means of establishing *prima facie* violations of the New York City net weight ordinance and (2) rejected General Mills' argument that the City's activities in assuring honest weights and measures were preempted by the FPLA.

The opinion of the court below stands in stark contrast to that affirmed by the Second Circuit. The Ninth Circuit rejected use of a lot averaging system, the Second affirmed use of such a system; the court below found that the FPLA preempted State activity, the New York court predicated its opinion upon the recognition that weights and measures enforcement is inherently a matter of local concern; the Ninth Circuit all but eliminated California's power to prescribe permissible variations while the Second affirmed that "a city must be afforded wide discretion in determining what variations from stated weight are reasonable" (398 F.Supp. at 153) even though one consequence might be to require out-of-state packagers to alter their practices to conform to local standards which are applied equally to all.

The conflict in circuits is undeniable. When combined with the devastating impact which the decision below has on California's attempt to assure truth in packaging, upon the police power of the States, and upon the procedures used by virtually every other

sional ratification to a disputed administrative construction of its powers is "shaky business." In the instant case it is an assertion resting upon quicksand). And as the Congress has never had the occasion to review by legislative change the Secretary of Agriculture's enforcement of the Wholesome Meat Act, citation by the court below of *Red Lion Broadcasting Co. v. F.T.C.*, 395 U.S. 367, 381 (1969) and *Flood v. Kuhn*, 407 U.S. 253, 283 (1972) is inapposite.

State in determining weight of prepackaged commodities, amici submit that the conflict in the circuits is serious and requires resolution by this Court.

4. THE DECISION BELOW WILL HAVE A DECISIVE, ADVERSE IMPACT UPON CONSUMERS AND COMPETITORS AND UPON FEDERAL-STATE RELATIONS

The present State laws which require a uniform standard of accuracy are important to: (1) *consumers* who must rely on package labels showing net weight or net quantity in comparing values among competing products, (2) *retailers* who not only sell packaged goods in competition with other retailers, but who are also large purchasers of packaged products which they then repackage into smaller products; for example, meat cuts and cheeses, (3) *restaurant operators, schools and other institutions* which buy large quantities of packaged foods, (4) *federal agencies* such as the Department of Defense and the Veterans Administration which buy large quantities of packaged foods, (5) *packagers* of food and other consumer products who are in competition with domestic and foreign packagers, (6) *farmers* who sell to packagers, since shortages in packages can mean less total product purchased, and (7) *manufacturers and servicers of packaging, weighing and measuring equipment* since packagers who are permitted shortages depending upon the type of equipment used are induced to use poor rather than modern, accurate equipment.

The decision below voids State laws designed to (1) enable consumers to rely upon the truth of representations made to them in the marketplace, (2) assure that all competitors must meet the same, beneficial

standards. It substitutes an unenforceable, non-standard which gives guidance to neither field inspector nor packer; substitutes an unnecessary, time consuming package by package inspection system for a practical, statistically valid lot inspection procedure, and forbids an inspector from ordering off sale short weight packages unless he expends his time also ordering off sale over weight packages.

To all the States the consequences of the ruling below are severe. If the ruling below is permitted to stand, there will be no enforceable standard—rather the States will be unable to prevent the sale of food-stuffs which are falsely labeled or adulterated.

The result of the Ninth Circuit's errors is a system conceived in error, designed to assure consumers only that they cannot rely upon the truth of package weight statements and one which frustrates fair enforcement of honest weights and measures laws.

Amici submit that no constitutional principle permits the result reached by the circuit court. As Justice Charles Evans Hughes said in *Savage v. Jones*, 225 U.S. 501, 528 (1911):

“... the Constitution of the United States does not secure to anyone the privilege of defrauding the public.”

Without State laws and State enforcement, there would be no effective weights and measures enforcement in the United States. Federal agencies will not be able to fill the void left by State agencies rendered ineffective by the decision below. First, the decision below precludes use of practical, statistically valid weight testing procedures by both federal and state

governments. Second, Congress has never—from passage of the first Food and Drugs Act of 1906 to the present—provided federal agencies with budgets necessary to employ or train weights and measures personnel. The States have both trained personnel and budgetary resources; and we have more—the inherent power to protect consumers and honest competitors from fraud in the marketplace.

The conflict of the ruling below with the sovereign authority of the States to prevent fraud in the marketplace, with principles of prior decisions of this Court and the certain harm which will follow the Ninth Circuit's decision, justify the granting of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

The Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. section 135(a) provides:¹

It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

. . . .

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

- (a) the name and address of the manufacturer, registrant, or person for who manufactured;
- (b) the name, brand, or trade-mark under which said article is sold; and

¹This statute was amended to transfer responsibility for its enforcement to the Administrator, Environmental Protection Agency, by 84 Stat. 2086. No substantive change was made to 7 U.S.C. § 135(a)(2)(c).

(c) *the net weight or measure of the content: Provided, That the Secretary may permit reasonable variations.* (Emphasis added.)

The United States Department of Agriculture issued an interpretation of this statute which has been adopted as a regulation by the Environmental Protection Agency, the agency now charged with its enforcement.

This regulation, 40 C.F.R. §162.104, provides:

Interpretation with respect to statement of net contents.

(a) *Requirement of the act.* The act requires that the label of each economic poison bear a statement of the net weight or measure of the contents.

(b) *Terms of weight or measure.* (1) If there are terms of weight or measure in general use for a particular economic poison which will give accurate information to users as to the quantity of content, such terms shall be used on the label.

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the average net content unless stated as a minimum quantity. Where average net content is used:

(i) The average content of the packages in any shipment must not fall below the quantity

stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the average in the content of any package.

(e) *Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.

CHECKING PREPACKAGED COMMODITIES

A Manual for Weights and Measures Officials

Malcolm W. Jensen

NATIONAL BUREAU OF STANDARDS
HANDBOOK 67

U.S. DEPARTMENT OF COMMERCE
Lewis L. Strauss, Secretary

NATIONAL BUREAU OF STANDARDS
A. V. Astin, Director

Issued March 20, 1959

[Seal]

Preface

This publication is the fifth in the series of Handbooks of the National Bureau of Standards designed to present in compact form comprehensive guides for State and local weights and measures officials.

This Handbook presents an operational guide for the control, under law, of prepackaged commodities. It includes information on equipment, techniques, action, reporting, and as an appendix, a comprehensive table that will facilitate the checking of total selling price extensions when these are based on stipulated unit prices.

Authority for such activity on the part of the Bureau is found in basic legislation (64 Stat. 371) wherein the Bureau is authorized to undertake, among others, the following functions: "Cooperation with the States in securing uniformity in weights and measures laws and methods of inspection," and "The compilation and publication of general scientific and technical data resulting from the performance of the functions specified herein or from other sources when such data are of importance to scientific or manufacturing interests or to the general public, and are not available elsewhere * * *."

This Handbook has been published in "pocket" size to further its usefulness to the official and facilitate the adaptation of the price-computation tables to field inspection.

Although the publication has been prepared primarily for use by weights and measures officials of the States, counties, and cities, it is believed that the information presented will be useful to persons employed by commercial and industrial establishments involved in the packing, distributing, and retailing of packaged commodities.

A. V. Astin, *Director.*

CHECKING PREPACKAGED COMMODITIES

Malcolm W. Jensen

A manual for State and local weights and measures officials, describing a method for controlling various types of prepackaged commodities.

1. INTRODUCTION

There is presented here a method of control of prepackaged commodities (commodities put up in packages in advance of being offered for sale) for use by State and local weights and measures officials—a method based on two concepts:

(1) Variations in quantities of packages are not permitted to such extent that the averages of the quantities in the packages comprising a lot, shipment, or delivery is below the quantity stated, and an unreasonable shortage in any individual package is not acceptable, even though overages in other packages in the same lot, shipment, or delivery compensate for such shortages. (This is the basic quantity requirement of the Model Regulation for Prepackaged Commodities adopted by the National Conference on Weights and Measures and of the Federal Food and Drug Administration.)

(2) Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection *must* be recognized and allowances for such imperfection must be made. These allowances are recognized in the "average" concept.

2. GENERAL CONSIDERATIONS

The control of the accuracy of quantity in packages is a specialized, yet extremely vital, phase of weights and measures administration.

Obviously the mere assurance of accurate mechanical equipment is only the foundation of weights and measures control, the culmination of which is the assurance of accurate quantity representations to the consumer through official supervision over the use of the weighing and measuring devices.

Special equipment is required for package-quantity checking, and the personnel assigned to this phase of the weights and measures program must receive special training. Although it is not inappropriate to conduct package-checking procedures in conjunction with and during the store visits made for the primary purpose of scale testing, major efforts in package checking will be most effective if they are separated from other phases of the weights and measures enforcement program. For a sustained program of package checking in a large jurisdiction, it is suggested that the very best results will be obtained if this activity is carried on by trained specialists who concentrate on this type of work.

The inspector assigned principally to mechanical inspections and only as a sideline to package checking will normally execute this phase of his work in the retail stores. Occasionally even he will find it advantageous to check packages at wholesale distributors and even, in special circumstances, at the establishment of the manufacturer or packer. The specialist assigned full time to this work will find that much of his

activity is carried on at the locations of the distributors and the packers in his jurisdiction. He will "run down" reports of package inaccuracies reported by other inspectors and, on his own initiative, spot-check distributors of packaged merchandise.

The primary object of the inspector in this field is to see that quantity is accurately represented to the ultimate purchaser—the consumer; nevertheless, he may be of very real service to the manufacturer, distributor, and retailer if he is able to identify the exact point at which any shortages begin to appear.

Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure * * * to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as "ordinary and customary exposure" and "good distribution practice" are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation

that will result in the building up of a working knowledge as to what is "customary exposure" and what may be considered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture.

To be truly adequate, a package-checking program must be extensive with respect to the relative time spent, and diversified with respect to the types of packages checked. General coverage of the packages offered for sale in the jurisdiction is the key to adequacy and appropriateness. A program should not be directed to a single type of package, such as fresh meats in self-service markets, or even to a few types. Packages distributed through interstate commerce, canned peas and bottled vinegar, for example, should receive a proportionate share of attention.

Although a weights and measures administrator will direct concentration on specific items for special surveys or to correct quickly faults that have been discovered, he will plan the general program so as to "sample" all areas of commodities sold in packages.

3. CLASSES OF PREPACKAGED COMMODITIES

There are two distinct classes of prepackaged commodities—"random" packages, representing packages of a single commodity in a variety of random sizes which in most cases are put up in the retail store, and "standard-pack" packages, representing packages of a single commodity put up in selected sizes. Within the standard-pack class there are two categories, those packages sold by weight and those sold by liquid

measure. Although in certain respects the operations in regard to "random" and "standard-pack" packages differ, the equipment used for the checking and the approach to the checking activity are similar in each case.

4. EQUIPMENT

In the belief that the testing equipment used by a weights and measures official should be, insofar as practicable, "standard" equipment designed especially for and restricted to official use and tested regularly and completely controlled by the official, the procedures described here will, for the most part, involve the use of special equal-arm package-reweighing scales and standard test weights. It is recommended that the first such scale required for this work be one of nominal 3-pound (actual, with careful use, 10-pound) capacity, with center tower and side bar. The tower should show zero in the center and 1 ounce divided into 1/16 ounce on each side of zero. The side bar also should have zero in the center, with at least 2 ounces divided into 1/8 ounce on each side of zero. The scale should be fitted with locking devices to hold the lever during transit and with a handle for carrying, and should be provided with a protective cover or box.

For the checking of larger packages, such as hams, turkeys, potatoes, apples, and the like, a similar equal-arm scale with capacity of at least 50 pounds is recommended; however, until such a scale is provided, an approved commercial scale in regular use in a market will be satisfactory. Likewise, scales of even larger capacities, platform beam for example, will be used in the checking of 50- and 100-pound bags of

produce, feed, seed, and the like. Whenever commercial scales are used by the inspector, the weighing of the packages should be done by the "substitution" method (see 9.1, Step 1 (b), below)—that is, substituting on the scale standard weights in an amount equal to the declared weight of the package and thus using the scale only as an indicator. The commercially used scale should not be used by the inspector for direct readings of package weights.

Standard weights employed by the official during check-weighing procedures may be the same as or similar to those used in testing scales. Normally a total of 30 pounds, with denominations down to 1/16 ounce in the customary system and 0.001 pound in the decimal system, is adequate for small packages, and one 25-pound and two 50-pound test weights will be sufficient for most all large packages. Volumetric measures, 1/2 pint to 1 gallon (conical with slicker plates) and a 2-ounce cylindrical glass graduate graduated to 1/2 fluid dram, will be used in checking standard-pack packages sold by liquid measure.

5. POSITION FOR PACKAGE-CHECKING OPERATION

After the announcement of his presence, the official should select a suitable position for his package-checking operations. The principal requirement of the site is convenience—both to the inspector and to the store personnel and customers. If one that is in the customer area of the store yet out of the way of normal customer traffic can be found, it will be quite proper to perform the tasks in the view of the public. This tends to inform the casual onlookers as to one important phase

of the weights and measures program. Such activity also will represent good public relations for the store, if the packages being checked are found to be accurately labeled.

6. SAMPLE SELECTION

(The word "sample" will be used herein to designate the small group of packages, usually 10, selected to represent a lot, shipment, or delivery. In a storage area such as is found on the premises of a manufacturer, packer, distributor, and in some cases a retailer, the total inventory of a single item of merchandise in a single size may be found to contain 2 or more lots, each indentifiable by a lot symbol. In these instances it is advisable to sample one or more of the individual lots and take action on such individual lot, independent of other lots of the same type package.)

With the location selected, it is advisable to decide, at least tentatively, the lots of prepackaged items that are to be checked (for example, hamburger, chuck roasts, pork chops, calf liver, sliced American cheese, Swiss cheese, cereal, canned beans, salt, and the like) and select the samples from those lots. There are two important considerations in the selection of samples. First, the sample should be of sufficient number to represent properly the lot from which it is taken, yet not so many as to require for a single lot a disproportionate amount of checking time; and second, the samples should be selected from various places in the lot—top, bottom, center, right, left, front, rear—again so that the lot is properly represented. Under normal conditions a sample of 10 will be adequate. A larger sample does not increase the reliability of the sample in an amount proportional to the increase.

(An exception in the nature of a larger sample for very large lots is explained in Step 5 of the Checking Procedure, page 9 [17-18].)

If practicable, all samples should be selected before the weighing of any is begun. This provides for checking the counter "as found," and avoids any possibility of packages being added to or removed from a lot that is to be checked during the time another lot is being checked, and thus disturbing the as-found condition.

7. SCALE TEST

Once the samples have been selected, the scale to be used in the checking procedure is made ready. If the packages are of such size that the equal-arm scale is to be used, the scale must be placed on a firm support and should be leveled. The scale, itself, should be tested in the new environment. (A simple test is appropriate, such as a careful observation of zero-load indication, one or two equal loads on each pan, one small load to test the tower indicator and side bar, and a test for sensitiveness.) A test not only will assure the inspector that his device is operating properly; it will also convince any observers as to the care exercised by the weights and measures official in the conduct of his duties.

If the packages are large, the store scale that is to be used in the checking should be selected, both as to its physical condition and as to its convenience from the standpoint of the store personnel, and should be examined as to its appropriateness for the checking procedure. Such a scale obviously should be a "sealed" scale. It should be checked carefully for sensitiveness

and should be used only if it is sufficiently sensitive to indicate clearly weight in the amount that errors are to be defined. Once the scale has been selected, it should not be released to commercial service until the inspector's use of it has been completed.

8. CHECKING PROCEDURE

8.1. *Random Packages* (see also Section 9).—The checking procedure is designed to determine whether the average quantity of contents of the packages in a lot is at least equal to the average declared quantity, and also whether there exist any "unreasonably" large errors in the package labeling. This procedure develops such information through the determination of errors in individual packages. The step-by-step procedure for checking random packages follows:

Step 1. Checkweighing.—

(a) *Equal-Arm Scale.* Weigh each package of the sample representing a single lot by placing on one pan of the scale the package and on the other pan the tare, as represented by similar packaging material (essentially uniform packaging materials having been used for similar packages), and standard weights equal to the declared weight. Read the error as shown on the tower indicator, or tower indicator plus side bar graduations, if the error is greater than the tower capacity, to the nearest 1/16 ounce.

(b) *"Substitution" Method.* First "balance in" on the load-receiving element of the scale to be used, standard weights in small denominations sufficient in total weight to equal the largest plus error that might be expected in the packages to be weighed. Determine

carefully the weight of the packaging material, and then place on the load-receiving element of the scale standard weights in an amount equal to the tare weight plus the labeled weight. Note the exact indication of the scale (either automatically indicated or indicated by poise placement—with or without counterpoise weights—as the case may be). Remove these standard weights from the load-receiving element and place thereon a package to be weighed. Restore precisely the previously noted scale indication by adding or removing standard weights. The weights thus added or removed indicate the package error—*short* (minus) if weights are *added*, *over* (plus) if weights are *removed*.

Because some shortages in package weight are caused by the leaking of fluids from the commodity, and because certain packages are sufficiently watertight that they will hold such leaked fluid, it will be advisable to make special observation in certain instances. If a package containing a commodity suspected of leaking is transparent, and if any tray, cup, or other absorbent packaging material apparently has not absorbed any moisture, the package may be turned upside down so that any fluid will run to the transparent top and be easily seen. If fluid is apparent inside the package, or if the packaging material appears to be or to have been wet and soggy, the package should be opened and the net weight determined directly.

Step 2. Recording (see also Section 11).—Record the labeled weight and the error in 1/16 ounce for

each small package, or in an appropriate denomination for each large package. The zero errors (recorded as 0) and the plus errors are listed in one column, the minus errors in a second column (See example, Step 5.)

Step 3. Unreasonable errors.—Circle errors that are “unreasonably” large, either plus or minus. The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made any may be predicated, to a certain extent, on knowledge. Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness of errors in packages containing large individual elements.

(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each “labeled quantity.” This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.)

UNREASONABLE MINUS OR PLUS ERRORS

Labeled quantity	Minus error Greater than	Plus error Greater than
0 to 2 ounces.....	1/8 ounce.....	1/4 ounce.
2+ to 8 ounces.....	3/16 ounce.....	3/8 ounce.
8 ounces+ to 2 pounds.....	1/4 ounce.....	1/2 ounce.
2+ to 4 pounds.....	5/16 ounce.....	5/8 ounce.
4+ to 7 pounds.....	3/8 ounce.....	3/4 ounce.
7+ to 14 pounds.....	1/2 ounce.....	1 ounce.
14+ to 24 pounds.....	3/4 ounce.....	1 1/2 ounces.
24+ to 36 pounds.....	1 ounce.....	2 ounces.
36+ to 51 pounds.....	8 ounces.....	1 pound.
51+ to 101 pounds.....	2 pounds.....	4 pounds.

The figures offered above are suggested for the determination of the "reasonableness" of errors in individual packages; they should not be used as tolerance figures.

Step 4. Action based on unreasonable errors.—Action should be taken with respect to the packages with unreasonable errors (either + or —); the following is suggested:

(a) If one package of the sample of 10 packages has an unreasonably large *minus* error, that package may be ordered repacked or relabeled, or may be held to constitute a violation of the statute and taken as evidence, at the discretion of the inspector.

(b) If there are in the sample of 10 packages 2 or more packages with unreasonably large *minus* errors, the *entire lot* should be held in violation, *without further calculation*. Appropriate action with respect to ordering off sale, prosecution, or the like should be taken. (See 10. Official Action.)

(c) If 3 or less of the sample of 10 packages have unreasonably large *plus* errors, these should be called to the attention of the market operator or the person responsible.

(d) If there are in the sample of 10 packages 4 or more packages with unreasonably large *plus* errors, this should be considered to show poor packaging practice, without further calculation. This situation should be called to the attention of the store operator, who should be instructed as to more precise weighing.

Step 5. Determination of average error.—Average errors should be determined for those lots on which conclusions have not been reached under (b) and (d) in Step 4 above. The average error is determined as follows:

(a) As in the example below, add the plus (+) errors, on the one hand, and the minus (—) errors, on the other hand—excluding from the sums the circled figures which represent unreasonably large errors. (The unreasonably large errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging "pattern." For example, a sample could show 9 packages each with a minus error of 1/16 ounce and one package with a plus error of 9/16 ounce. If the large plus error is included, the average error is zero. Actually the "pattern" is minus 1/16 ounce per package, and this is evident when the "unreasonably" large plus error is excluded from the average.)

EXAMPLE

Error in $\frac{1}{16}$ oz	
—	0, +
3	0
1	2
⑥	0
—	2
4	1
	0
	1
	6

(b) Calculate the average error by (1) subtracting the smaller sum (plus errors or minus errors) from the larger sum, (2) giving the result the sign (+ or —) of the larger sum (in the example above: $+6 - 4 = +2$), and (3) dividing the result by the number of items not circled (or the total number of items, including the zeros, included in the sums). Thus, in the example, *average error* = $+2/9$.

This figure is the number of 16ths ounce that the “average” package of the sample (representing the lot being checked) deviates from zero error, and the sign indicates whether this average error is plus (overweight) or minus (short weight). This “average” is, of course, exclusive of those packages having unreasonably large errors.

Under many circumstances the inspector will be in a position at this point to declare whether or not the lot under examination conforms to the requirements of the law. In certain instances when a very large lot—say 200 packages or more—is being checked, a further step is advisable. If the average error found in the sample of 10 representing the very large lot

is plus, zero, or significantly minus, a decision on the lot is quite proper. If, however, the average error in the sample of 10 representing a very large lot is just barely minus, the inspector will want to convince himself that his small sample is truly representative. In this case 40 more packages should be selected *at random* from the *same* lot. These 40 packages should be weighed individually, the “unreasonably” large errors, plus and minus, circled and eliminated, and an average error calculated for the sample of 50 (the original 10 and the additional 40). Action should be taken on the lot according to the average error on the sample of 50, regardless of the magnitude of such average error.

Although the calculation designated (b) above is not necessary to establish the primary fact that the average net quantity of contents is or is not below the label quantity, this having been established at the conclusion of the computation designated (a), it is well for the inspector to complete the calculation of the average error in order that his report to his superior may be complete, in order that he may properly inform the packer as to the reason for any official action, and so that any record taken to court may be almost self-explanatory. (For action, if average quantity of contents is less than the declared quantity, see 10. Official Action.)

(It is advisable that all calculations made by the inspector be made on the official report form in order that these may be checked for accuracy later in the office.)

8.2. *Standard-Pack Packages—Contents Sold by Weight.*—The principal difference between the random and standard-pack packages from the standpoint of the checkweighing procedure is in the tare-weight deter-

mination. In random packages the tare material normally is readily available to the inspector, and for any random package being checked a duplicate of the packing material can be used on the checking scale to balance out the tare of the package. Obviously such is not the case in standard-pack packages. A procedure for checking standard-pack packages is given below:

Step 1. Weigh *gross* each of the 10 or more packages representing a sample of the same commodity and same type package to identify the *heaviest* and the *lightest* packages, gross weight, and record the gross weight of each.

Step 2. Open the lightest package, exercising care that none of the contents is spilled or lost, and determine the *net* weight of the contents. This can be done either by determining carefully the gross and tare weights and then subtracting the tare from the gross, or by weighing equally carefully the net contents. If the package being weighed is a "wet" commodity and if the label does not indicate the net weight is a "net drained weight," the fluid is part of the net weight and must be considered accordingly.

Step 3. If the net weight of the lightest package *at least equals* the declared net weight, it may be reasonable to assume that the lot is satisfactory.

Step 4. If the net weight of the lightest package *is less than* the declared weight, it will be necessary to treat the 10 packages as a sample of the lot and proceed to weigh them individually to determine individual errors. For this procedure it will be essential to arrive at an average tare weight to be used with the labeled net weight of the contents as the "standard" gross weight with which the package or packages are

compared. In order to arrive at a representative average tare weight for the sample, the *heaviest* package must be opened, and the tare weight of this package and of the previously opened lightest package be determined to the nearest 1/16 ounce. The average of these two tare weights may then be accepted as the tare weight for the weighing of the individual packages. (The inspector is cautioned that the tare of a single package is not considered acceptable as an average tare, and also that no "permanent" or "reference" record of tares is acceptably reliable. The same size can, bottle, or other container may vary significantly in weight over even a reasonably short factory run.)

Step 5. With standard weights in an amount equal to the average tare weight arrived at in Step 4 plus the labeled net weight on one side of the scale (or as the standard weight in the "substitution" procedure if an equal-arm scale is not used), weigh each package of the sample representing the lot and record the errors individually. Exclude, by circling, any errors (+ or —) that are unreasonably large, and determine an average error for the sample (see Steps 1, 2, 3, 4, and 5 of 8.1).

8.3 Standard-Pack Packages—Contents Sold by Liquid Measure.—The most convenient method of determining the accuracy of net-content labeling of packages containing liquids or semisolids and labeled by liquid measure is by weighing the packages. This method offers a rapid control procedure and should prove satisfactory for enforcement purposes, until the need for court action is indicated. *Any court action must be based on shortages of liquid quantity as determined by standard liquid measure (see Step 7 below).*

The control-by-weight method closely parallels the procedure described in 8.2. for standard-pack packages with contents sold by weight. For simplicity of presentation, a single commodity—fluid milk in 1-quart paper cartons—will be used as the example in the method description that follows:

Step 1. Open 2 cartons of milk and determine precisely (to the nearest $1/32$ ounce) the weight of one *measured* quart of the milk that is contained in the cartons under test, by first weighing an empty 1-quart standard measure and then weighing the measure filled with milk. The difference in the two weights will be the weight of one quart of the milk. This will serve as the *net* weight for the checkweighing procedure. If the first carton that is opened contains insufficient milk to fill the standard measure, use milk from the other carton for this purpose. (The correct net weight for the measured volume of milk must be determined for each dairy and for each type of fluid dairy product from a single dairy.)

Step 2. Weigh carefully (to the nearest $1/32$ ounce) the empty and dried cartons, from which the milk has been removed, to determine the *average* weight of the empty cartons. This average will serve as the *tare* for the checkweighing procedure. (It may be more convenient to go to each dairy plant that is distributing milk in paper cartons in the jurisdiction and weigh at least 10 cartons of each size and design, selected at random from the available stock. The averages thus obtained can serve as the tares for the checkweighing procedures throughout the jurisdiction. If this system of tare determination is followed, the averages should be checked frequently, because the weights of

empty cartons, even from the same manufacturer, will vary somewhat over a period of time.)

Step 3. Select at random a sample of at least 10 cartons of milk of a single grade from a single dairy.

Step 4. Place on one pan of the equal-arm scale standard weights in the amount of the average tare plus the correct net weight of the cartons under test, and on the other pan one at a time, the cartons of milk to be checked.

Step 5. As in Steps 2, 3, 4, and 5 of 8.1., determine the error in weight, to $1/16$ ounce, of each carton of milk, list the zero errors and plus errors in one column and the minus errors in another column, exclude by circling any errors that are unreasonably large, and determine the average error for the sample. (The weight differences between the gross weights of the commercially filled cartons and the correct gross weights—the sum of the correct *net* weight of the measured quantity of milk and the average *tare* weight for the particular carton—represent the errors, over or under, in terms of weight.)

Step 6. If desired, these errors may be converted to liquid measure by determining mathematically the weight of 1 fluid ounce of milk and dividing the weight difference (error) by that figure. Thus, if 1 quart of a particular milk (32 fluid ounces) weighs 34.4 ounces avoirdupois, one fluid ounce weighs $34.4 \div 32$, or 1.08 ounces avoirdupois. Then, if a carton is $\frac{1}{2}$ (0.5) avoirdupois ounce short, it is $0.5 \div 1.08$, or 0.46 fluid ounce short.

Step 7. If the checking of standard-pack packages labeled in terms of liquid measure is to result in prosecution, the actual complaint should be based on determinations of the quantity of contents of the packages by standard liquid measure. This is done by pouring the contents of each of the packages serving as the sample of the lot into a standard liquid measure and, using the small graduated glass standard, measuring carefully the liquid volume necessary to fill the standard or the liquid volume remaining in the carton after the standard has been filled. These shortages and overages are the errors that are to be considered in the determination of unreasonably short packages and of the average error.

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10. OFFICIAL ACTION RESULTING FROM PACKAGE CHECKING

10.1 Oral Discussions and Instructions.—Following the completion of the package-checking operations in a particular business establishment, an oral discussion of the results, between the inspector and the person in charge of the establishment, is recommended. Results of the checking should be explained by the inspector, and the information on the report form described. If the samples checked indicate general compliance with the law and regulations, yet there are found inconsistencies in weighing patterns, precision or accuracy less than the inspector is encountering in similar packages by other packers, or any other practices

that should receive attention, these should be explained in detail. Many times the inspector will find that his experience will make possible helpful suggestions for the store operator regarding ways and means of increasing accuracy of package labeling.

Oral discussion may also take the form of a "warning" that certain relatively serious conditions that have been found must be corrected.

Any recommendations, instructions, or warnings that are issued orally should be shown in abbreviated form on the official report, as, for example, "oral instructions re: large overages on packages," "oral instructions re: unnecessary + and — errors," or "warned re: pricing errors." The inference to be drawn from a warning (as distinguished from a recommendation or instruction) is that a continuation of the condition warned against will bring about punitive action by the official.

10.2. Legal Action.—In case the checking procedure discloses (a) one or more packages with unreasonably large minus errors, (b) an average minus error for the entire lot of packages, or (c) significant errors in selling price computations of one or more packages, there will have been demonstrated violation of legal requirements, and the need for punitive action may be indicated.

Legal action may take one or more of several forms, as the law in the particular jurisdiction provides, as per instructions from a superior, and as good judgment dictates: (1) "stop-sale" or "off-sale" orders, which

normally provide that the lot cannot be offered for sale until officially released; (2) "reweighing" or "re-marking" orders, which provide that an entire lot or individual items from a lot cannot be offered for sale until they have been corrected as to content or labeling (obviously applicable only to random packages, since standard-pack packages no longer would be standard-pack if each were to be remarked with a corrected quantity of contents); or (3) prosecution, in which case it is advisable to purchase or confiscate samples as evidence of the violation.

Whenever legal action is decided upon, this should be described in full on the official report form.

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[Appendix to Handbook 67 containing price computation table is omitted.]